

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 08, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ANGELIA B.,¹

Plaintiff,

vs.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 2:20-cv-00306-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 24, 25

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

² Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 Before the Court are the parties' cross-motions for summary judgment. ECF
2 Nos. 24, 25. The parties consented to proceed before a magistrate judge. ECF No.
3 7. The Court, having reviewed the administrative record and the parties' briefing,
4 is fully informed. For the reasons discussed below, the Court grants Plaintiff's
5 motion, ECF No. 24, and denies Defendant's motion, ECF No. 25.

6 JURISDICTION

7 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

8 STANDARD OF REVIEW

9 A district court's review of a final decision of the Commissioner of Social
10 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
11 limited; the Commissioner's decision will be disturbed "only if it is not supported
12 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
13 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
14 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
15 (quotation and citation omitted). Stated differently, substantial evidence equates to
16 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
17 citation omitted). In determining whether the standard has been satisfied, a
18 reviewing court must consider the entire record as a whole rather than searching
19 for supporting evidence in isolation. *Id.*

1 In reviewing a denial of benefits, a district court may not substitute its
2 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
3 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
4 rational interpretation, [the court] must uphold the ALJ’s findings if they are
5 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
6 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
7 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
8 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
9 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
10 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
11 *Sanders*, 556 U.S. 396, 409-10 (2009).

12 **FIVE-STEP EVALUATION PROCESS**

13 A claimant must satisfy two conditions to be considered “disabled” within
14 the meaning of the Social Security Act. First, the claimant must be “unable to
15 engage in any substantial gainful activity by reason of any medically determinable
16 physical or mental impairment which can be expected to result in death or which
17 has lasted or can be expected to last for a continuous period of not less than twelve
18 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
19 “of such severity that he is not only unable to do his previous work[,] but cannot,
20 considering his age, education, and work experience, engage in any other kind of

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §
2 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
5 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
6 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
7 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
8 C.F.R. § 416.920(b).

9 If the claimant is not engaged in substantial gainful activity, the analysis
10 proceeds to step two. At this step, the Commissioner considers the severity of the
11 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
12 “any impairment or combination of impairments which significantly limits [his or
13 her] physical or mental ability to do basic work activities,” the analysis proceeds to
14 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
15 this severity threshold, however, the Commissioner must find that the claimant is
16 not disabled. *Id.*

17 At step three, the Commissioner compares the claimant’s impairment to
18 severe impairments recognized by the Commissioner to be so severe as to preclude
19 a person from engaging in substantial gainful activity. 20 C.F.R. §
20 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the

1 enumerated impairments, the Commissioner must find the claimant disabled and
2 award benefits. 20 C.F.R. § 416.920(d).

3 If the severity of the claimant's impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant's "residual functional capacity." Residual functional capacity (RFC),
6 defined generally as the claimant's ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
8 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

9 At step four, the Commissioner considers whether, in view of the claimant's
10 RFC, the claimant is capable of performing work that he or she has performed in
11 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
12 capable of performing past relevant work, the Commissioner must find that the
13 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
14 performing such work, the analysis proceeds to step five.

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
18 must also consider vocational factors such as the claimant's age, education and
19 past work experience. *Id.* If the claimant is capable of adjusting to other work, the
20 Commissioner must find that the claimant is not disabled. 20 C.F.R. §

1 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis
2 concludes with a finding that the claimant is disabled and is therefore entitled to
3 benefits. *Id.*

4 The claimant bears the burden of proof at steps one through four above.
5 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
6 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
7 capable of performing other work; and (2) such work “exists in significant
8 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,
9 700 F.3d 386, 389 (9th Cir. 2012).

10 **ALJ’S FINDINGS**

11 On September 18, 2017, Plaintiff applied for Title XVI supplemental
12 security income benefits alleging a disability onset date of July 2, 2010.³ Tr. 16,
13 85, 237-43. The application was denied initially, and on reconsideration. Tr. 107-
14 15, 116-22. Plaintiff appeared before an administrative law judge (ALJ) on
15 December 5, 2019. Tr. 33-67. On December 26, 2019, the ALJ denied Plaintiff’s
16 claim. Tr. 13-30.

17 _____
18 ³ Plaintiff previously applied for Title XVI benefits on three occasions, resulting in
19 initial denials on December 6, 2007, September 16, 2010, and June 16, 2015;
20 Plaintiff did not appeal the denials. Tr. 269-70.

1 At step one of the sequential evaluation process, the ALJ found Plaintiff has
2 not engaged in substantial gainful activity since September 18, 2017. Tr. 18. At
3 step two, the ALJ found that Plaintiff has the following severe impairments:
4 fibromyalgia, degenerative disc disease of the cervical spine, facet disease of the
5 lumbar spine, depressive disorder, mild anxiety disorder, and post-traumatic stress
6 disorder. *Id.*

7 At step three, the ALJ found Plaintiff does not have an impairment or
8 combination of impairments that meets or medically equals the severity of a listed
9 impairment. Tr. 19. The ALJ then concluded that Plaintiff has the RFC to perform
10 light work with the following limitations:

11 She can perform all posturals frequently, except she can never climb
12 ladders, ropes, or scaffolds. She must avoid concentrated exposure to
13 extreme cold, humidity, vibration, respiratory irritants, and all
14 hazards. She is able to understand, remember, and carry out simple,
15 routine tasks and semi-skilled tasks; she is able to maintain
16 concentration, persistence, and pace for two hour intervals between
17 regularly scheduled breaks throughout an eight-hour workday; she can
18 have simple changes; she can make routine decisions; there should be
19 no fast paced production rate of pace; interaction with the public can
20 occur, but it needs to be limited to superficial.

Tr. 20.

At step four, the ALJ found Plaintiff has no past relevant work. Tr. 25. At
step five, the ALJ found that, considering Plaintiff's age, education, work
experience, RFC, and testimony from the vocational expert, there were jobs that
existed in significant numbers in the national economy that Plaintiff could perform,

1 such as mail clerk, hand packager, and small products assembler. *Id.* Therefore,
2 the ALJ concluded Plaintiff was not under a disability, as defined in the Social
3 Security Act, from the date of the application through the date of the decision. Tr.
4 26.

5 On June 25, 2020, the Appeals Council denied review of the ALJ's decision,
6 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes
7 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

8 ISSUES

9 Plaintiff seeks judicial review of the Commissioner's final decision denying
10 her supplemental security income benefits under Title XVI of the Social Security
11 Act. Plaintiff raises the following issues for review:

- 12 1. Whether the ALJ properly evaluated the medical opinion evidence;
- 13 2. Whether the ALJ conducted a proper step-three analysis;
- 14 3. Whether the ALJ properly evaluated Plaintiff's symptom claims; and
- 15 4. Whether the ALJ conducted a proper step-five analysis.

16 ECF No. 24 at 5-6.

DISCUSSION

A. Medical Opinion Evidence

Plaintiff contends the ALJ erred in her consideration of the opinions of Rebecca Alexander, Ph.D.; Joyce Everhart, Ph.D.; and Lawrence Garges, M.D. ECF No. 24 at 8-15.

As an initial matter, for claims filed on or after March 27, 2017, new regulations apply that change the framework for how an ALJ must evaluate medical opinion evidence. *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20 C.F.R. § 416.920c. The new regulations provide that the ALJ will no longer “give any specific evidentiary weight...to any medical opinion(s)...” *Revisions to Rules*, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R. § 416.920c(a). Instead, an ALJ must consider and evaluate the persuasiveness of all medical opinions or prior administrative medical findings from medical sources. 20 C.F.R. § 416.920c(a) and (b). The factors for evaluating the persuasiveness of medical opinions and prior administrative medical findings include supportability, consistency, relationship with the claimant (including length of the treatment, frequency of examinations, purpose of the treatment, extent of the treatment, and the existence of an examination), specialization, and “other factors that tend to support or contradict a medical opinion or prior administrative medical finding”

1 (including, but not limited to, “evidence showing a medical source has familiarity
2 with the other evidence in the claim or an understanding of our disability
3 program’s policies and evidentiary requirements”). 20 C.F.R. § 416.920c(c)(1)-
4 (5).

5 Supportability and consistency are the most important factors, and therefore
6 the ALJ is required to explain how both factors were considered. 20 C.F.R. §
7 416.920c(b)(2). Supportability and consistency are explained in the regulations:

8 (1) *Supportability*. The more relevant the objective medical evidence
9 and supporting explanations presented by a medical source are to
10 support his or her medical opinion(s) or prior administrative medical
11 finding(s), the more persuasive the medical opinions or prior
12 administrative medical finding(s) will be.

13 (2) *Consistency*. The more consistent a medical opinion(s) or prior
14 administrative medical finding(s) is with the evidence from other
15 medical sources and nonmedical sources in the claim, the more
16 persuasive the medical opinion(s) or prior administrative medical
17 finding(s) will be.

18 20 C.F.R. § 416.920c(c)(1)-(2). The ALJ may, but is not required to, explain how
19 the other factors were considered. 20 C.F.R. § 416.920c(b)(2). However, when
20 two or more medical opinions or prior administrative findings “about the same
issue are both equally well-supported ... and consistent with the record ... but are
not exactly the same,” the ALJ is required to explain how “the other most
persuasive factors in paragraphs (c)(3) through (c)(5)” were considered. 20 C.F.R.
§ 416.920c(b)(3).

1 The parties disagree over whether Ninth Circuit case law continues to be
2 controlling in light of the amended regulations, specifically whether the “clear and
3 convincing” and “specific and legitimate” standards still apply. ECF No. 24 at 8;
4 ECF No. 25 at 4-9. “It remains to be seen whether the new regulations will
5 meaningfully change how the Ninth Circuit determines the adequacy of [an] ALJ’s
6 reasoning and whether the Ninth Circuit will continue to require that an ALJ
7 provide ‘clear and convincing’ or ‘specific and legitimate reasons’ in the analysis
8 of medical opinions, or some variation of those standards.” *Gary T. v. Saul*, No.
9 EDCV 19-1066-KS, 2020 WL 3510871, at *3 (C.D. Cal. June 29,
10 2020) (citing *Patricia F. v. Saul*, No. C19-5590-MAT, 2020 WL 1812233, at *3
11 (W.D. Wash. Apr. 9, 2020)). “Nevertheless, the Court is mindful that it must defer
12 to the new regulations, even where they conflict with prior judicial precedent,
13 unless the prior judicial construction ‘follows from the unambiguous terms of the
14 statute and thus leaves no room for agency discretion.’” *Gary T.*, 2020 WL
15 3510871, at *3 (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet*
16 *Services*, 545 U.S. 967, 981-82 (2005); *Schisler v. Sullivan*, 3 F.3d 563, 567-58 (2d
17 Cir. 1993) (“New regulations at variance with prior judicial precedents are upheld
18 unless ‘they exceeded the Secretary’s authority [or] are arbitrary and
19 capricious.’”).

1 There is not a consensus among the district courts as to whether the “clear
2 and convincing” and “specific and legitimate” standards continue to apply. *See*,
3 *e.g.*, *Kathleen G. v. Comm’r of Soc. Sec.*, 2020 WL 6581012, at *3 (W.D. Wash.
4 Nov. 10, 2020) (applying the specific and legitimate standard under the new
5 regulations); *Timothy Mitchell B., v. Kijakazi*, 2021 WL 3568209, at *5 (C.D. Cal.
6 Aug. 11, 2021) (stating the court defers to the new regulations); *Agans v. Saul*,
7 2021 WL 1388610, at *7 (E.D. Cal. Apr. 13, 2021) (concluding that the new
8 regulations displace the treating physician rule and the new regulations control);
9 *Madison L. v. Kijakazi*, No. 20-CV-06417-TSH, 2021 WL 3885949, at *4-6 (N.D.
10 Cal. Aug. 31, 2021) (applying only the new regulations and not the specific and
11 legitimate nor clear and convincing standard). For the sake of consistency in this
12 District, the Court adopts the rationale and holding articulated on the issue in
13 *Emilie K. v. Saul*, No. 2:20-cv-00079-SMJ, 2021 WL 864869, *3-4 (E.D. Wash.
14 Mar. 8, 2021), *appeal docketed*, No. 21-35360 (9th Cir. May 10, 2021). In *Emilie*
15 *K.*, this Court held that the ALJ did not err in applying the new regulations over
16 Ninth Circuit precedent, because the result did not contravene the Administrative
17 Procedure Act’s requirement that decisions include a statement of “findings and
18 conclusions, and the reasons or basis therefor, on all the material issues of fact,
19 law, or discretion presented on the record.” *Id.* at *4 (citing 5 U.S.C. § 557(c)(A)).
20 This rationale has been adopted in other cases with this Court. *See, e.g., Jeremiah*

1 *F. v. Kijakazi*, No. 2:20-CV-00367-SAB, 2021 WL 4071863, at *5 (E.D. Wash.
2 Sept. 7, 2021). Nevertheless, it is not clear that the Court's analysis in this matter
3 would differ in any significant respect under the specific and legitimate standard
4 set forth in *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

5 *1. Dr. Alexander*

6 On June 9, 2015, Dr. Alexander conducted a psychological consultative
7 examination and rendered an opinion on Plaintiff's functioning. Tr. 339-44. Dr.
8 Alexander diagnosed Plaintiff with severe major depressive disorder, chronic
9 PTSD, and ADHD by history. Tr. 343. Dr. Alexander opined Plaintiff's recent
10 and immediate memory were below normal limits and her abstract thinking was
11 slightly below normal limits; her ability to understand and remember instructions is
12 mildly impaired; her ability to sustain concentration, persist, and interact
13 appropriately in the workplace is markedly impaired, and her functioning was
14 otherwise within normal limits. Tr. 344. The ALJ found Dr. Alexander's opinion
15 was not persuasive. Tr. 24.

16 First, the ALJ found Dr. Alexander's opinion was not supported by her own
17 objective findings. *Id.* Supportability is one of the most important factors an ALJ
18 must consider when determining how persuasive a medical opinion is. 20 C.F.R. §
19 416.920c(b)(2). The more relevant objective evidence and supporting explanations
20 that support a medical opinion, the more persuasive the medical opinion is. 20

1 C.F.R. § 416.920c(c)(1). The ALJ noted that Plaintiff could perform serial sevens,
2 basic subtraction, and could recall one of three objects after a delay. Tr. 24 (citing
3 Tr. 343). Dr. Alexander opined Plaintiff had marked limitations in her ability
4 concentrate, persist, and interact appropriately, and stated Plaintiff's recent and
5 immediate memory were below normal limits, she had a severely depressed mood,
6 her thought processes were "only moderately intact," she had difficulty recalling
7 dates, and she occasionally needed questions explained and repeated. Tr. 340, 344.
8 Plaintiff was also cooperative, alert, and moderately pleasant, with normal eye
9 contact and speech, and Dr. Alexander stated Plaintiff's remote memory, fund of
10 information, ability to calculate math problems, and judgement were all normal.
11 Tr. 339-40, 342-43. While Plaintiff offers an alternative interpretation of Dr.
12 Alexander's examination results, ECF No. 24 at 11, the Court may not reverse the
13 ALJ's decision based on Plaintiff's disagreement with the ALJ's interpretation of
14 the record. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008)
15 ("[W]hen the evidence is susceptible to more than one rational interpretation" the
16 court will not reverse the ALJ's decision). The ALJ's finding that Dr. Alexander's
17 opinion was not supported by her examination results is reasonable and supported
18 by substantial evidence. Further, any error is harmless as the ALJ gave other
19 supported reasons to reject the opinion. *See Molina*, 674 F.3d at 1115.

1 Second, the ALJ found Dr. Alexander's opinion was based on a single
2 evaluation that took place two years before the relevant adjudicative period. Tr.
3 24. An ALJ may consider whether new evidence received after the medical source
4 rendered his or her medical opinion impacts the persuasiveness of the opinion. 20
5 C.F.R. § 416.920c(5). Plaintiff alleges disability beginning on July 2, 2010,
6 however the relevant adjudicative period is from September 18, 2017 onward, thus
7 Dr. Alexander rendered her opinion more than two years prior to the relevant
8 period. Further, the ALJ reasonably found that the later evidence received after
9 Dr. Alexander rendered her opinion is inconsistent with Dr. Alexander's opinion,
10 as discussed *infra*. Thus, the ALJ's finding that Dr. Alexander's opinion is less
11 persuasive because it was rendered two years prior to the relevant period is
12 supported by substantial evidence.

13 Third, the ALJ found Dr. Alexander's opinion was inconsistent with the
14 medical evidence from other sources. Tr. 24. Consistency is one of the most
15 important factors an ALJ must consider when determining how persuasive a
16 medical opinion is. 20 C.F.R. § 416.920c(b)(2). The more consistent an opinion is
17 with medical evidence from other sources, the more persuasive the medical
18 opinion is. 20 C.F.R. § 416.920c(c)(2). The ALJ found the medical records
19 consistently document unremarkable findings on mental status examination. Tr. 24
20 (citing Tr. 365, 419, 426, 432, 457, 470, 497, 503, 508). Plaintiff argues the ALJ's

1 citations are inaccurate as they contain abnormalities on examination. ECF No. 24
2 at 10. The cited records indicate Plaintiff had many normal findings, including
3 normal mood, attitude, movement, appearance, orientation, eye contact,
4 presentation, attention, calculation/recall, speech, and memory, and Plaintiff was
5 noted as cooperative. Tr. 365, 419, 426, 432, 439, 449, 457, 469-70, 497, 503,
6 508. There are also some documented abnormalities, including Plaintiff behaving
7 in a frightened manner, with a sad, depressed, anxious, and fearful mood, and
8 constricted and potentially dissociative affect, with only fair memory/general
9 knowledge, distractible thoughts, short attention span, unmotivated behavior, and
10 suicidal ideation. Tr. 365, 489-90, 503, 508. Plaintiff denied depression, anxiety,
11 and hopelessness at multiple appointments. Tr. 424, 430, 437, 447, 495. While
12 Plaintiff again offers a differing interpretation of the record, ECF No. 24 at 10-11,
13 the ALJ's finding that Dr. Alexander's opinion is inconsistent with the objective
14 medical evidence is supported by substantial evidence.

15 *2. Dr. Everhart*

16 On December 27, 2017, Dr. Everhart conducted a psychological consultative
17 examination and rendered an opinion on Plaintiff's functioning. Tr. 459-64. Dr.
18 Everhart diagnosed Plaintiff with recurrent major depressive disorder; unspecified
19 anxiety disorder; attention deficit hyperactivity disorder; substance abuse disorder
20 (methamphetamine) in remission per self-report; unspecified personality disorder

1 with antisocial and borderline features; and provisional diagnosis of unspecified
2 neurocognitive disorder. Tr. 464. Dr. Everhart opined Plaintiff's functioning,
3 including her attention, concentration, intellectual ability, and persistence, were
4 within normal limits, but stated Plaintiff "does have serious symptoms in
5 occupational and social [realms]." Tr. 463-64. The ALJ found Dr. Everhart's
6 opinion was somewhat persuasive.⁴ Tr. 23.

7 First, the ALJ found Dr. Everhart's opinion was vague. *Id.* The more
8 relevant the supporting explanation presented by a source is to their opinion, the
9 more persuasive the opinion will be. 20 C.F.R. § 416.920c(c)(1). Dr. Everhart
10 only opined that Plaintiff has serious symptoms in the occupational and social
11 realms. Tr. 464. Dr. Everhart did not state what functional limitations the
12 symptoms cause. The rest of Dr. Everhart's summary outlines a largely normal
13 mental status examination and does not offer any clarification on Plaintiff's

14 _____
15 ⁴ Plaintiff argues the ALJ failed to address evidence from Dr. Everhart, ECF No.
16 24 at 4-5, and argues the evidence from Dr. Everhart was consistent with Dr.
17 Alexander's opinion, thus the Court has addressed the ALJ's analysis of Dr.
18 Everhart's opinion despite Plaintiff waiving the issue due to the failure to address
19 any of the reasons offered by the ALJ to reject Dr. Everhart's opinion. *See*
20 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008).

1 functional limitations. Tr. 463-64. Plaintiff argues Dr. Everhart's examination and
2 opinion is consistent with Dr. Alexander's, as Dr. Everhart found Plaintiff was
3 depressed, tearful, and somewhat anxious, with a low delayed memory score. ECF
4 No. 24 at 4. Despite Plaintiff's abnormal mood, affect, and delayed memory score,
5 Plaintiff's examination was otherwise normal, and the examination does not
6 provide any additional information on what Dr. Everhart believed Plaintiff's
7 serious symptoms were or how they limited her. As such, the ALJ's finding that
8 Dr. Everhart's opinion was vague is supported by substantial evidence.

9 Second, the ALJ found Dr. Everhart's examination findings did not support
10 her opinion. Tr. 23. Supportability is one of the most important factors an ALJ
11 must consider when determining how persuasive a medical opinion is. 20 C.F.R. §
12 416.920c(b)(2). The more relevant objective evidence and supporting explanations
13 that support a medical opinion, the more persuasive the medical opinion is. 20
14 C.F.R. § 416.920c(c)(1). The ALJ noted Dr. Everhart's examination documented
15 Plaintiff's normal attention, intellectual ability, concentration, persistence, pace,
16 and normal scores on the Trail Making tests. Tr. 23. Dr. Everhart also stated
17 Plaintiff had normal speech, fair eye contact, and Plaintiff reported being able to
18 handle chores and personal care. Tr. 463-64. The ALJ noted there were
19 examination findings suggestive of limitations, but the findings did not support any
20 limitations greater than those accounted for in the RFC. Tr. 23. The ALJ's finding

1 that Dr. Everhart's opinion is not supported by the examination findings is
2 supported by substantial evidence.

3 Third, the ALJ found Dr. Everhart's opinion was inconsistent with the
4 unremarkable findings documented by other providers. Tr. 23. Consistency is one
5 of the most important factors an ALJ must consider when determining how
6 persuasive a medical opinion is. 20 C.F.R. § 416.920c(b)(2). The more consistent
7 an opinion is with medical evidence from other sources, the more persuasive the
8 medical opinion is. 20 C.F.R. § 416.920c(c)(2). As discussed *supra*, the medical
9 records largely contain normal mental status examinations and reports from
10 Plaintiff that she was not experiencing mental health symptoms. As such, the
11 ALJ's finding that Dr. Everhart's opinion is inconsistent with the longitudinal
12 record is supported by substantial evidence.

13 Further, any error in the ALJ's consideration of Dr. Everhart's opinion
14 would be harmless. Dr. Everhart did not set forth any specific functional
15 limitations, thus the ALJ's failure to include Dr. Everhart's opinion in the RFC
16 would not have any impact on the RFC, and any error is harmless. *See Molina*,
17 674 F.3d at 1115.

18 3. *Dr. Garges*

19 On January 24, 2018, Dr. Garges performed a physical consultative
20 examination and rendered an opinion on Plaintiff's functioning. Tr. 466-76. Dr.

1 Garges listed Plaintiff's subjective complaints, which included arthritis and
2 fibromyalgia, but did not provide any diagnoses. Tr. 466. Dr. Garges opined
3 Plaintiff could sit 20 minutes at a time for a total of two hours in a workday; stand
4 for 20 minutes at a time for a total of two hours in a workday; walk 10 minutes at a
5 time for a total of one hour in a workday; lift/carry up to 20 pounds occasionally
6 "not very far, long"; occasionally reach, handle, feel, grasp, and finger; and she has
7 limitations in bending/stooping, crouching, turning at the waist, reaching behind
8 her, and in her ability to handle exposure to "temperature, noise, heights, etc." Tr.
9 474. While the ALJ found Dr. Garges' opinion was persuasive, the ALJ did not
10 fully incorporate Dr. Garges' opinion into the RFC.⁵ Tr. 23-24.

11 First, the ALJ found Dr. Garges' opinion was not supported by his
12 examination findings. *Id.* Supportability is one of the most important factors an
13

14 ⁵ Defendant argues the ALJ intended to write that Dr. Garges' opinion is not
15 persuasive, and that the sentence stating Dr. Garges' opinion is persuasive is
16 clearly a typographical error given the ALJ's analysis of the evidence and opinion.
17 ECF No. 25 at 13. However, the ALJ summarized both evidence that supports and
18 detracts from Dr. Garges' opinion, the ALJ did not give reasons to reject portions
19 of Dr. Garges' opinion, and the ALJ incorporated portions of Dr. Garges' opinion
20 into the RFC, thus the Court cannot find it is clearly a typographical error.

1 ALJ must consider when determining how persuasive a medical opinion is. 20
2 C.F.R. § 416.920c(b)(2). The more relevant objective evidence and supporting
3 explanations that support a medical opinion, the more persuasive the medical
4 opinion is. 20 C.F.R. § 416.920c(c)(1). The ALJ found that while Dr. Garges
5 opined Plaintiff could only engage in occasional manipulative activities, this was
6 inconsistent with Plaintiff's ability to make a fist, oppose her fingers, pinch, grasp,
7 and manipulate both large and small objects without difficulty. Tr. 24 (citing Tr.
8 473). Plaintiff also had normal range of motion in her elbows, wrists, and hands.
9 Tr. 472. While Dr. Granges opined Plaintiff had multiple postural limitations, the
10 ALJ noted Plaintiff had symmetrical strength, normal sensation and reflexes, and
11 full range of motion except in her neck. Tr. 24, 470-73. However, Plaintiff also
12 had a "hesitant gait pattern," was unable to squat and rise with ease, was unable to
13 walk on heels and toes and to hop on one foot, had some palpable muscle spasms
14 in her neck and low back, a limited straight leg test, difficulty rising from a seated
15 position and getting on and off the examination table, and her strength ranged from
16 a 3 to 5, with 5 being normal. Tr. 470-71.

17 While the ALJ pointed to specific examination findings that were
18 inconsistent with the manipulative limitations, the ALJ's analysis does not explain
19 why the ALJ rejected Dr. Garges' opinion that Plaintiff can only sit for two hours,
20 stand for two hours, and walk for one hour in a workday, and engage in postural

1 activities only occasionally. Tr. 23-24. The ALJ found Dr. Garges' opinion was
2 inconsistent with the examination, which documented only "mild-to-moderate
3 findings," but the ALJ did not discuss Plaintiff's abnormal gait, and the other
4 abnormal findings discussed *supra*. Tr. 24. Further, the ALJ did not consider the
5 unique nature of fibromyalgia and did not discuss SSR 12-2p. *See* SSR 12-2p,
6 2012 WL 3104869 (effective July 25, 2012). Fibromyalgia is a disease that eludes
7 objective measurement. *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004).
8 "[A] person with fibromyalgia may have 'muscle strength, sensory functions, and
9 reflexes [that] are normal.'" *Revels v. Berryhill*, 874 F.3d 648, 663 (9th Cir. 2017).
10 Normal objective examination results can be "perfectly consistent with debilitating
11 fibromyalgia." *Id.* at 666. Here, the ALJ rejected Dr. Garges' opinion as
12 inconsistent with the medical evidence, including normal sensation and reflexes,
13 with no analysis of Plaintiff's fibromyalgia. Tr. 24. The ALJ's finding that Dr.
14 Garges' opinion was inconsistent with the examination is not supported by
15 substantial.

16 Second, the ALJ found Dr. Garges' opinion was inconsistent with the
17 objective evidence from other sources. Tr. 23. Consistency is one of the most
18 important factors an ALJ must consider when determining how persuasive a
19 medical opinion is. 20 C.F.R. § 416.920c(b)(2). The more consistent an opinion is
20 with medical evidence from other sources, the more persuasive the medical

1 opinion is. 20 C.F.R. § 416.920(c)(2). The ALJ found Dr. Garges' opinion was
2 inconsistent with the repeatedly normal findings on physical examination and
3 mild-to-moderate findings on medical imaging. Tr. 24 (citing Tr. 377, 419, 426,
4 497, 502, 508, 478). The cited records document Plaintiff having normal reflexes,
5 strength, sensation, and gait, and imaging of the back found L3 anterior
6 subluxation but otherwise normal findings. Tr. 377, 419, 426, 478, 497, 502, 508.
7 Medical records also document Plaintiff having a limp when ambulating, a positive
8 straight leg raise test, and reports of symptoms associated with fibromyalgia,
9 including fatigue/daytime sleepiness, impaired sleep, pain, anxiety, memory loss,
10 and depression, and a need to increase Plaintiff's gabapentin to treat her
11 fibromyalgia. Tr. 342, 366-69, 376, 389, 432, 449, 453, 455, 462, 486. Plaintiff
12 also had moderate lordosis and degenerative disc disease. Tr. 377, 477.

13 While the ALJ pointed to some objective evidence to support her conclusion
14 that Dr. Garges' opinion is inconsistent with the objective evidence, there is no
15 analysis of the evidence typically associated with fibromyalgia. SSR 12-2p notes
16 that fibromyalgia symptoms can wax and wane, and the symptoms associated with
17 fibromyalgia, such as widespread pain and fatigue, can cause exertional
18 limitations, and fibromyalgia can cause nonexertional limitations, such as postural
19 and environmental limitations. SSR 12-2p, 2012 WL 3104869 (effective July 25,
20 2012). As the analysis lacks any consideration of Plaintiff's fibromyalgia, the

1 ALJ's finding that Dr. Garges' opinion is inconsistent with the objective evidence
2 is not supported by substantial evidence. On remand, the ALJ is instructed to
3 reconsider Dr. Garges' opinion and incorporate the limitations into the RFC or give
4 reasons supported by substantial evidence to reject the opinion. The ALJ is further
5 instructed to reconsider Plaintiff's fibromyalgia and SSR 12-2p.

6 **B. Step Three**

7 Plaintiff contends the ALJ erred at step three by failing to find her
8 impairments meet or equal Listing 14.09D. ECF No. 24 at 15-17. At step three,
9 the ALJ must determine if a claimant's impairments meet or equal a listed
10 impairment. 20 C.F.R. § 416.920(a)(4)(iii).

11 The Listing of Impairments "describes for each of the major body systems
12 impairments [which are considered] severe enough to prevent an individual from
13 doing any gainful activity, regardless of his or her age, education or work
14 experience." 20 C.F.R. § 416.925. "Listed impairments are purposefully set at a
15 high level of severity because 'the listings were designed to operate as a
16 presumption of disability that makes further inquiry unnecessary.'" *Kennedy v.*
17 *Colvin*, 738 F.3d 1172, 1176 (9th Cir. 2013) (citing *Sullivan v. Zebley*, 493 U.S.
18 521, 532 (1990)). "Listed impairments set such strict standards because they
19 automatically end the five-step inquiry, before residual functional capacity is even
20

1 considered.” *Kennedy*, 738 F.3d at 1176. If a claimant meets the listed criteria for
2 disability, she will be found to be disabled. 20 C.F.R. § 416.920(a)(4)(iii).

3 “To *meet* a listed impairment, a claimant must establish that he or she meets
4 each characteristic of a listed impairment relevant to his or her claim.” *Tackett*,
5 180 F.3d at 1099 (emphasis in original); 20 C.F.R. § 416.925(d). “To *equal* a
6 listed impairment, a claimant must establish symptoms, signs and laboratory
7 findings ‘at least equal in severity and duration’ to the characteristics of a relevant
8 listed impairment” *Tackett*, 180 F.3d at 1099 (emphasis in original) (quoting
9 20 C.F.R. § 404.126(a)); 20 C.F.R. § 416.926(a). “If a claimant suffers from
10 multiple impairments and none of them individually meets or equals a listed
11 impairment, the collective symptoms, signs and laboratory findings of all of the
12 claimant’s impairments will be evaluated to determine whether they meet or equal
13 the characteristics of any relevant listed impairment.” *Id.* However, “‘[m]edical
14 equivalence must be based on medical findings,’ and “[a] generalized assertion of
15 functional problems is not enough to establish disability at step three.’ ” *Id.* at 1100
16 (quoting 20 C.F.R. § 404.1526(a)); 20 C.F.R. § 416.926(a).

17 The claimant bears the burden of establishing her impairment (or
18 combination of impairments) meets or equals the criteria of a listed impairment.
19 *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005). “An adjudicator’s
20 articulation of the reason(s) why the individual is or is not disabled at a later step in

1 the sequential evaluation process will provide rationale that is sufficient for a
2 subsequent reviewer or court to determine the basis for the finding about medical
3 equivalence at step 3.” SSR 17-2P, 2017 WL 3928306, at *4 (effective March 27,
4 2017).

5 Here, the ALJ found that Plaintiff’s impairments and combinations of
6 impairments did not meet or equal any listings, including Listing 14.09D. Tr. 19.
7 While Listing 14.09D addresses inflammatory arthritis, it is the most closely
8 analogous listing for fibromyalgia. SSR 12-2p, 2012 WL 3104869 (effective July
9 25, 2012). Listing 14.09D requires repeated manifestations of inflammatory
10 arthritis, with at least two of the constitutional symptoms or signs (severe fatigue,
11 fever, malaise, or involuntary weight loss) and one of the following at the marked
12 level: 1) Limitation of activities of daily living; 2) Limitation in maintaining social
13 functioning; or 3) Limitation in completing tasks in a timely manner due to
14 deficiencies in concentration, persistence, or pace. 20 C.F.R. Pt. 404, Subpt. P,
15 App. 1, Listing 14.09D.

16 The ALJ found Plaintiff’s impairments do not meet or equal Listing 14.09D
17 but did not set forth an analysis of the listing. Tr. 19. As above, the ALJ’s step
18 three analysis is devoid of any analysis of Plaintiff’s fibromyalgia symptoms. On
19 remand, the ALJ is instructed to reconsider whether Plaintiff’s impairments meet
20 or equal Listing 14.09D and set forth an analysis as the listing.

C. Plaintiff's Symptom Claims

Plaintiff faults the ALJ for failing to rely on reasons that were clear and convincing in discrediting her symptom claims. ECF No. 24 at 17-20. An ALJ engages in a two-step analysis to determine whether to discount a claimant's testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted). "The claimant is not required to show that [the claimant's] impairment could reasonably be expected to cause the severity of the symptom [the claimant] has alleged; [the claimant] need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations omitted). General findings are insufficient; rather, the ALJ must identify what symptom claims are being discounted and what evidence undermines these claims. *Id.* (quoting *Lester*, 81 F.3d at 834; *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently explain why it discounted claimant's

1 symptom claims)). “The clear and convincing [evidence] standard is the most
2 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,
3 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
4 924 (9th Cir. 2002)).

5 Factors to be considered in evaluating the intensity, persistence, and limiting
6 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
7 duration, frequency, and intensity of pain or other symptoms; 3) factors that
8 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
9 side effects of any medication an individual takes or has taken to alleviate pain or
10 other symptoms; 5) treatment, other than medication, an individual receives or has
11 received for relief of pain or other symptoms; 6) any measures other than treatment
12 an individual uses or has used to relieve pain or other symptoms; and 7) any other
13 factors concerning an individual’s functional limitations and restrictions due to
14 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
15 416.929(c). The ALJ is instructed to “consider all of the evidence in an
16 individual’s record,” to “determine how symptoms limit ability to perform work-
17 related activities.” SSR 16-3p, 2016 WL 1119029, at *2.

18 The ALJ found that Plaintiff’s medically determinable impairments could
19 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff’s
20

1 statements concerning the intensity, persistence, and limiting effects of her
2 symptoms were not entirely consistent with the evidence. Tr. 21.

3 The ALJ's evaluation of Plaintiff's symptom claims, and the resulting
4 limitations largely relies on the ALJ's assessment of the medical evidence. Having
5 determined a remand is necessary to readdress Dr. Granges' opinion and Plaintiff's
6 fibromyalgia symptoms, any reevaluation must necessarily entail a reassessment of
7 Plaintiff's subjective symptom claims. Thus, the Court need not reach this issue
8 and on remand the ALJ must also carefully reevaluate Plaintiff's symptom claims
9 in the context of the entire record. *See Hiler v. Astrue*, 687 F.3d 1208, 1212 (9th
10 Cir. 2012) ("Because we remand the case to the ALJ for the reasons stated, we
11 decline to reach [plaintiff's] alternative ground for remand."). For the purposes of
12 the remand, the ALJ notes that the ALJ's analysis of Plaintiff's symptom claims is
13 devoid of an analysis of Plaintiff's fibromyalgia symptoms. The ALJ notes that
14 Plaintiff reported at least two flares of fibromyalgia per month, which can last for
15 days each. Tr. 21. However, there is no discussion of Plaintiff's fibromyalgia
16 symptoms or treatment.

17 **D. Step Five**

18 Plaintiff contends the ALJ erred at step five by relying on vocational expert
19 testimony given in response to an incomplete hypothetical. ECF No. 24 at 20-21.
20 At step five of the sequential evaluation analysis, the burden shifts to the

Commissioner to establish that 1) the claimant can perform other work, and 2) such work “exists in significant numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran*, 700 F.3d at 389. In assessing whether there is work available, the ALJ must rely on complete hypotheticals posed to a vocational expert. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ’s hypothetical must be based on medical assumptions supported by substantial evidence in the record that reflects all of the claimant’s limitations. *Osenbrook v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001). The hypothetical should be “accurate, detailed, and supported by the medical record.” *Tackett*, 180 F.3d at 1101. As the case is being remanded for the reasons discussed herein, the ALJ is instructed to perform the five-step analysis anew, including step five.

E. Remedy

Plaintiff urges this Court to remand for an immediate award of benefits. ECF No. 24 at 21.

“The decision whether to remand a case for additional evidence, or simply to award benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)). When the Court reverses an ALJ’s decision for error, the Court “ordinarily must remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke*, 379 F.3d at 595 (“the proper course, except in rare

1 circumstances, is to remand to the agency for additional investigation or
2 explanation”); *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th
3 Cir. 2014). However, in a number of Social Security cases, the Ninth Circuit has
4 “stated or implied that it would be an abuse of discretion for a district court not to
5 remand for an award of benefits” when three conditions are met. *Garrison*, 759
6 F.3d at 1020 (citations omitted). Under the credit-as-true rule, where (1) the record
7 has been fully developed and further administrative proceedings would serve no
8 useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for
9 rejecting evidence, whether claimant testimony or medical opinion; and (3) if the
10 improperly discredited evidence were credited as true, the ALJ would be required
11 to find the claimant disabled on remand, the Court will remand for an award of
12 benefits. *Revels*, 874 F.3d at 668. Even where the three prongs have been
13 satisfied, the Court will not remand for immediate payment of benefits if “the
14 record as a whole creates serious doubt that a claimant is, in fact, disabled.”
15 *Garrison*, 759 F.3d at 1021.

16 The Court finds further finds further proceedings are necessary to resolve
17 conflicts in the record, including conflicting medical opinions. As such, the case is
18 remanded for proceedings consistent with this Order.

CONCLUSION

Having reviewed the record and the ALJ's findings, the Court concludes the ALJ's decision is not supported by substantial evidence and is not free of harmful legal error. Accordingly, **IT IS HEREBY ORDERED:**

1. The District Court Executive is directed to substitute Kilolo Kijakazi as Defendant and update the docket sheet.

2. Plaintiff's Motion for Summary Judgment, **ECF No. 24**, is **GRANTED**.

3. Defendant's Motion for Summary Judgment, **ECF No. 25**, is **DENIED**.

4. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff REVERSING and REMANDING the matter to the Commissioner of Social Security for further proceedings consistent with this recommendation pursuant to sentence four of 42 U.S.C. § 405(g).

The District Court Executive is directed to file this Order, provide copies to counsel, and **CLOSE THE FILE**.

DATED October 8, 2021.

s/Mary K. Dimke
MARY K. DIMKE
UNITED STATES MAGISTRATE JUDGE